Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-164

EARL LEPPO,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1977

No.

EARL LEPPO,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petioner, Earl Leppo, respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Fifth Circuit to review their final judgment of this case.

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit, announced May 27, 1977, is reported in —— F.2d —— (1977).

A copy of said opinion is contained herein and annexed as Appendix "A".

Jurisdiction

The judgment sought to be reviewed was entered on May 27, 1977 and an order denying a petition for rehearing was entered on June 30, 1977. (See Appendix "B")

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Did the respondent, by its agents act in bad faith in not naming the petitioner as a known person in its wiretap applications within the meaning of 18 U.S.C. §2518(1)(b)(iv) and §2518(4)(a) thereby requiring the suppression of evidence relating to him from the wiretaps and the fruits thereof?

2. Was the refusal to furnish petitioner with the names of all persons who listened to the wire communication for the purpose of identifying his voice and were unable to do so, a violation of petitioner's rights under the Fifth and Sixth Amendments and *Brady* v. *Maryland*, 373 U.S. 83 (1963)?

3. Was the quashing of the Subpoena Duces Tecum to Special Agent Heist for the purpose of obtaining documents pertaining to respondent's knowledge and activities concerning petitioner as "a known person" in the wiretap application a denial of the petitioner's rights to due process of law under the Fifth Amendment to the Constitution of the United States?

4. Was defendant prejudiced by the testimony of a government witness that petitioner declined to make a statement when he was read his Miranda Warnings?

5. Did the government fail to comply with 18 U.S.C. §2518(1)(c) as to co-defendant Goldstein thereby rendering the wiretap applications and orders invalid and requiring suppression of all evidence and the fruits thereof as to both the co-defendant and petitioner.

Constitutional Provisions and Statutes Involved

The Constitutional provisions involved in this case are:

United States Constitution — Amendment IV
United States Constitution — Amendment V
United States Constitution — Amendment VI
18 U.S.C. §2
18 U.S.C. §1084
18 U.S.C. §1952
18 U.S.C. §1955
18 U.S.C. §2510-2519

These provisions are set forth in Appendix "C" annexed hereto.

Statement of Case

The defendant, Earl Leppo together with Martin Sklaroff and Reuben Goldstein were charged in a nine-count indictment in the United States District Court for the Southern District of Florida with violating 18 U.S.C. §1952 through the use of interstate telephone to promote, facilitate, or carry on unlawful gambling activity contrary to the laws of Florida and of the United States.

The government's evidence included tapes of conversations alleged to have been made between Goldstein and Sklaroff and Leppo and Sklaroff. These tapes were the

product of electronic surveillance of four Sklaroff telephones in the Miami area.

Prior to obtaining court authorization for the electronic surveillance, on or about May 22, 1973, Agent Jansen of the Boston FBI received information from a reliable confidential informant that Leppo was a layoff bookmaker doing business from Boston to Miami. For the next eight weeks Jansen investigated Leppo.

On or about May 31, 1973 a second reliable informant told another FBI agent that Leppo was in daily contact with Sklaroff by phone. This information was given to both Jansen and the Miami FBI.

A telegram or telex from the New York office of the FBI advised both Miami and Boston FBI offices that Earl Leppo was in daily telephone contact with Sklaroff and laying off bets. Agent Heist of the Miami office received this information on May 31, 1973.

On June 6, 1973, an application, with an affidavit by Agent Heist attached, was made to a judge of the United States District Court for the Southern District of Florida for authorization to tap two phones in the name of Martin Sklaroff. At the time of the applications (June 6, 1973) Agent Heist testified that he "suspected" Earl Leppo was engaged in interstate gambling and believed he was calling Sklaroff. Earl Leppo was not named in the application or the affidavit and the information that he was in daily telephone contact with Sklaroff and laying off bets and the suspicions and belief of the FBI agents that Leppo was involved were not disclosed to the judge.

The application was granted and interceptions commenced on June 11, 1973. On June 12, 1973, Miami FBI requested Boston FBI to place Leppo under surveillance. Agent Heist testified that the reason he told Jansen to follow Leppo was because he thought Leppo would be calling Sklaroff.

The interceptions terminated on June 13, 1973.

On June 14, 1973, Miami FBI requested Boston FBI to cease surveillance of Leppo.

On June 19, 1973, Miami FBI wrote Boston FBI:

> "Miami Agents believe that the caller may be identical to EARL LEPPO"
>
> and
>
> "Miami has a Title III application in on SKLAROFF's new numbers and when this intercept is effected Boston will be advised in order that LEPPO can be surveilled and appropriate long distance tolls obtained."

An application for a second intercept was filed on June 27, 1973. The interceptions were conducted and terminated on July 9, 1973.

Subsequently a search warrant was obtained and executed on Leppo's person and on April 30, 1974, Leppo was indicted on five counts of using interstate telephone wire communications to facilitate a business enterprise involved in gambling (18 U.S.C. §§2, 1084 and 1952).

Martin Sklaroff (now deceased) and Reuben Goldstein were similarly charged in the same indictment.

Prior to trial both Leppo and Goldstein moved for suppression of information gained from the wiretaps. Each joined in the other's motions.

The petitioner Earl Leppo contended that he was a known person whom the government failed to name in either of its applications despite their knowledge and belief and their contemporaneous surveillance.

Co-defendant Goldstein contended that the applications failed to adequately comply with the provisions of 18 U.S.C. §2518(1)(c); i.e., that the government did not in-

form the judge that Goldstein's conversations were overheard on a 1971 interception authorized by the United States District Court for the Eastern District of Tennessee.[1]

The petitioner attempted to subpoena all of the documents in the possession of the FBI pertaining to their knowledge of him as a known person. His Subpoena Duces Tecum in this regard was quashed at the suppression hearing.

Prior to trial petitioner moved that he be furnished with the names of all persons who listened to the tapes for the purpose of identifying his voice and were unable to do so. The motion was denied.

At the trial a government witness, an FBI agent, testified that he had advised the petitioner Leppo of his rights. Upon objection and after a colloquy between Court and Counsel the witness spontaneously stated: "Mr. Leppo declined to make any statement."

Petitioner and co-defendants were found guilty.

Reasons for Granting the Writ

This case involves an important question of federal law which has not been, but should be settled by this Court. In *United States* v. *Donovan*, ——— U.S. ——— 97 S.Ct. 658, 50 L.Ed. 2d 652 (1977) this Court did not decide whether proof of governmental bad faith in not disclosing all persons it had probable cause to believe are engaged in the criminal activity in question in its wiretap application would require suppression of the evidence obtained.

---

[1] Petitioner is advised that co-defendant Goldstein is filing a Petition for Certiorari which will state this issue in detail. Petitioner joins in this argument and is mindful of the fact that under Rule 21 both petitions will be joined. Therefore, for brevity, petitioner will rely on Goldstein's presentation.

This case raises the question of bad faith. Here the government agents not only had probable cause to believe that Earl Leppo was so engaged, but did in fact so believe. Contemporaneously with the interception they placed Leppo under surveillance. Yet they deliberately did not disclose their information or their beliefs to the District Court Judge. For the sole purpose of expediting their investigation they did not comply with the requirements of 18 U.S.C. §2518. This petitioner submits is bad faith. Bad faith is a breach of a known duty through some motive or interest. *Spiegel* v. *Beacon Participations,* 297 Mass. 398, 8 N.E. 2d 895 (1937).

Secondly, this Court has held that evidence favorable to the accused in the possession of the government must be furnished to the accused as a matter of due process. *Brady* v. *Maryland, supra.* The order denying petitioner's motion to be furnished with names of the witnesses who were unable to identify his voice is clearly against the decisions of this Court.

The denial of petitioner's Subpoena Duces Tecum violated petitioner's rights to due process of law under the Fifth Amendment to the Constitution of the United States in that petitioner was seeking to obtain specific government documents relating to the FBI investigation of himself in connection with the illegal gambling activity. The material called for by the subpoena was necessary for the petitioner to establish the illegality of the wiretap. *Alderman* v. *United States,* 394 U.S. 165 (1969). The subpoena was a reasonable request for production. *United States* v. *Nixon,* 418 U.S. 683 (1974). The quashing of the subpoena deprived the petitioner of his opportunity to present evidence favorable to his cause.

This case also raises the question as to whether or not the petitioner's Fifth Amendment rights were violated when a government witness volunteered that the petitioner de-

clined to make a statement when advised of his Miranda rights.

Lastly, petitioner's co-defendant, Goldstein, has raised the issue, in which petitioner joins, as to whether the affidavit in the wiretap application was sufficient to meet the standards set forth in 18 U.S.C. §2518(1)(c). This Court should resolve this issue as there is a conflict between the 9th Circuit (*United States* v. *Kalustian*, 529 F.2d 585 (1975)) and the 5th Circuit which ruled in the instant case.

Conclusion

For the reasons above stated, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the Fifth Circuit

No. 75-2116

UNITED STATES of America,
PLAINTIFF-APPELLEE,
v.
Martin SKLAROFF, Rueben Goldstein,
and Pearl Leppo, a/k/a Earl Leppo,
DEFENDANTS-APPELLANTS.

May 27, 1977.

Appeal from the United States District Court for the Southern District of Florida.

Before MORGAN, CLARK and TJOFLAT, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Defendants Sklaroff,[1] Goldstein and Leppo were charged in a nine count indictment in the United States District Court for the Southern District of Florida with violating 18 U.S.C. §1952[2] through the use of interstate telephones

[1] Defendant Martin Sklaroff having died while this appeal was pending, his appeal has been dismissed.

[2] 18 U.S.C. § 1952 reads as follows:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or
(2) commit any crime of violence to further any unlawful activity; or
(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

to promote, facilitate, or carry on unlawful gambling activity contrary to the laws of Florida and of the United States. The Government introduced evidence to establish that between June 13, 1973 and July 8, 1973, the defendants made interstate telephone calls to carry on unlawful gambling activity. That is, Rueben Goldstein, operating out of Las Vegas, often called Martin Sklaroff, a Miami bookmaker and gave him "line information," or the odds, on various professional baseball games. Typically, several minutes after Goldstein's call, Earl Leppo, a bookmaker operating in the Boston area, called Sklaroff, received the line information, and then placed substantial bets with Sklaroff. In addition to FBI surveillance and identification testimony, testimony of three of Sklaroff's gambler-customers, testimony of an FBI expert on bookmaking, telephone records, and bookmaking paraphernalia and records seized from the defendants pursuant to a search warrant, the Government's evidence included tapes of conversations between Goldstein and Sklaroff and between Leppo and Sklaroff. These tapes were the product of electronic surveillance of four Sklaroff telephones in the Miami area. Authorized by Judge Roettger of the United States District Court of Florida pursuant to Title III of the Omnibus Crime Control and Safe Street Act of 1968, as amended, 18 U.S.C. §§2510-2520, the first surveillance was conducted between June 11 and June 13, 1973. Agents halted the in-

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treas[illegible].

terception on June 13 when they learned that Sklaroff was switching his operations to a different location and to different telephones. After receiving a second application supported by an affidavit from Marilu Marshall, a special attorney with the Miami Strike Force, Judge Roettger issued another order authorizing the interception of wire communications of Martin Sklaroff, Rueben Goldstein and others, as yet unknown" for a second fifteen day period. Agents then conducted interceptions of two phones used by Sklaroff in Miami, beginning the electronic surveillance on June 28, 1973 and terminating it on July 9.

[1] Defendants' primary contentions of error deal with alleged deficiencies in the application for an interception order that the task force attorney submitted to Judge Roettger. First, they argue that the failure of the task force to identify Earl Leppo in either of their applications violated 18 U.S.C. §2518(1)(b)(iv),[3] which requires that each application identify all known persons who are committing the offense and whose communications are to be intercepted. Appellants argue that Department of Justice attorneys had probable cause to believe that Earl Leppo was committing the offenses under investigation and violated §2518(1)(b)(iv) by not listing him on their applications. In *United States* v. *Doolittle,* 507 F.2d 1368, aff'd *en banc,* 518 F.2d 500 5th Cir. (1975), *cert. denied* 423 U.S. 1008, 96 S.Ct. 439, 46 L.Ed. 2d 380 (1977) we upheld the

[3] 18 U.S.C. § 2518(1)(b)(iv) states:

(1) Each application for an order authorizing the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including . . . (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

admission of evidence from a wiretap against several defendants whom the Government allegedly had probable cause to believe would be involved in the ongoing criminal activity, but who were not named in the wiretap application, on the ground that the defendants had not demonstrated any prejudice in not being named in the application and that defendants had presented no evidence of Governmental bad faith. In a recent holding, however, the Supreme Court had held that while Title III requires the Government to name on its wiretap application any person whom it has probable cause to believe is engaged in the criminal activity under question, failure to meet this requirement does not require suppression of the evidence produced.[4] *U.S.* v. *Donovan,* U.S. , 97 S.Ct. 658, 50 L.Ed.2d 652 (1977). Therefore, according to *Donovan,* even assuming that Leppo was a "known person" who should have been named in the application, the Government's failure to do this does not require suppression of the evidence obtained against him.

[2] Appellant Goldstein argues that the application did not comply with either §2518(1)(c) or §2518(1)(e) and that, as a result, evidence obtained through electronic surveillance made pursuant to those deficient applications should be suppressed. 18 U.S.C. §2518(1)(c) provides that applications for wire interceptions include:

> [a] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

---

[4] While the opinion in *Donovan* apparently rejects that part of our holding that made a showing of prejudice a ground for suppressing a wiretap based on an application that did not name all "known persons," it did not decide whether proof of Governmental bad faith in not disclosing all such persons would justify suppression. *See United States* v. *Donovan,* ___ U.S. ___ at ___, 97 S.Ct. 658 at 672, 50 L.Ed.2d 652, at 673 n.23 (1977). Because appellants do not allege or show such bad faith, we do not have to decide that question in this case.

Appellant contends that the Government's attempt to comply with this requirement was inadequate in that affidavits submitted for this purpose were conclusory and did not provide sufficient facts from which a detached judge could determine whether alternate, viable investigative procedures existed. In support of his argument, appellant Goldstein cites *United States* v. *Kalustian,* 529 F.2d 585 (9th Cir. 1975), in which the Ninth Circuit held that affidavits that rely on conclusory allegations and boilerplate language to show the unavailability of other investigative techniques are insufficient to meet the standard set forth in §2518(1)(c). Yet, this court has held that §2518(1)(c) "must be read in a common sense fashion." *United States* v. *Robertson,* 504 F.2d 289 (5th Cir. 1974), *cert denied* 421 U.S. 913, 95 S.Ct. 1568, 43 L.Ed.2d 778. Accordingly, the purpose of the statute "is not to foreclose electronic surveillance until every other imaginable method of investigation [has] been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." *United States* v. *Pacheco,* 489 F.2d 554, 565 (5th Cir. 1974). *Kalustian* notwithstanding, this court has recently examined an affidavit containing the same allegations that appellant argues in this case are inadequate and ruled that it complies with §2518(1)(c). Thus, in *United States* v. *McCoy,* 539 F.2d 1050 (5th Cir. 1976), we held that in order to uphold a wiretap order, the affidavit must only supply a "factual predicate" adequate to support the judge's implicit finding that "[the] 'investigative procedures appear unlikely to succeed.' " *Id.* at 1055-56. In that case, the panel held to be an adequate factual predicate an affidavit stating that based on the FBI agent's experience in investigating gambling offenses and on the fact that searches of gamblers usually failed to prove all the elements of federal offenses, particularly with respect to participants not present

at the searched premises, that gamblers often do not keep permanent records, that temporary records are often destroyed during a search and are often in a code that is difficult to decipher, that FBI informants would be unwilling to testify, and that physical surveillance would jeopardize the investigation, electronic surveillance was necessary. The allegations contained in the affidavit under attack in this case being almost identical to those approved in *McCoy,* we likewise hold that the application in question complied with §2518(1)(c).

[3] In his final attack on the adequacy of the application for a wiretap order, appellant Goldstein argues that the Government did not comply with 18 U.S.C. §2518(1)(e), which requires each application to contain:

> a full and complete statement of the facts concerning *all previous applications* known to the individual authorizing and making the application made to any judge for authorization to intercept, or for approval of interruptions of wire or oral communications *involving any of the same persons, facilities or places specified in the application,* and the action taken by the judge on each such application.

(Emphasis added). In its application to intercept communications of Sklaroff and Goldstein, the Government listed three previous applications for wire interceptions of Sklaroff and Goldstein, two for the former and one for the latter. Appellant Goldstein contends, however, that it failed to mention one wiretap application in which he was involved and that this non-compliance with §2518(1)(e) mandates suppression of the tapes obtained pursuant to Judge Roettger's two orders. Specifically, Goldstein alleges that the Government did not inform Judge Roettger that Goldstein's conversations were overheard on a 1971 interception authorized by the United States District Court for the Eastern District of Tennessee. Goldstein concedes

that he was not a target of the application, itself, in that the application was directed at "James Alexander Clark," a/k/a "Butterball," David R. Thomas, a/k/a "Ross Thomas," and others as yet unknown." Rather, he argues that because the affidavit submitted in support of the application discussed some of his gambling activities with Clark and Thomas, this application should have been brought to Judge Roettger's attention. Several courts, including this one, have held than an application to intercept conversations of a particular individual does not have to reveal a prior interception of that individual's conversations when that person was not the target of the application seeking the prior interception. *See United States* v. *Florea,* 541 F.2d 568 (6th Cir. 1976); *United States* v. *Kilgore,* 518 F.2d 496 (5th Cir. 1975), reh. denied, 524 F.2d 957, cert. denied, —— U.S. ——, 97 S.Ct. 1173 (1977). *United States* v. *Bellosi,* 163 U.S.App.D.C. 273, 51 L.Ed.2d 581, 501 F.2d 833, 839 n. 13 (1974); *United States* v. *O'Neill,* 497 F.2d 1020 (6th Cir. 1974); *United States* v. *Chiarizio,* 388 F.Supp. 858 (D.Conn.1975). In other words, if the Government submits an application to intercept the calls of John Doe and during their surveillance of him record conversations with Jane Roe, a subsequent application to intercept Jane Roe's calls does not have to refer to the John Doe application to satisfy §2518(1)(c). Here, appellant argues that discussion of his gambling activities in an affidavit supporting a Title III application made him a target of that application and rendered that application subject to §2518(1)(c). We disagree. An affidavit is submitted to justify an interception order by furnishing evidence of the Government's probable cause to believe that the named targets of the application are engaging in illegal gambling activities. In an effort to establish probable cause to conduct surveillance of the named individuals, the affidavit might discuss the activity of numerous people not named as targets of

the investigation. It does not follow, however, that anyone listed in the affidavit is thereby deemed a target of the investigation subject to the dictates of §2518(1)(c). We also find the appellant's reliance on *United States* v. *Bellosi,* 163 U.S.App. D.C. 273, 501 F.2d 833 (1974), to be misplaced. In *Bellosi,* the District of Columbia Court of Appeals held that the Government violated §2518(1)(c) when it purposely did not disclose in its applications that one of the intended targets had also been a target of an earlier application. Here, Goldstein was not a target of the Tennessee application. Likewise, the Government listed three prior interception applications directed at Sklaroff and Goldstein, so that no inference that it was trying to hide any previous interceptions is justified. In short, we hold that §2518(1)(c) requires disclosure of only those previous *applications* directed at the person for whom the subsequent application is made.

[4, 5] Appellants also contend that the attorney who presented the case to the grand jury — Martin Steinberg, a special attorney with the United States Department of Justice — was not *specifically directed,* within the meaning of 28 U.S.C. §515(a), to present this indictment against defendants and that the indictment must therefore be dismissed. Section 515(a) states:

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

The Department of Justice hired Steinberg as an attorney on June 12, 1972 and the Assistant Attorney General for the Criminal Division, Henry Petersen, appointed him to the Miami Strike Force on November 30, 1972 with the following directive:

> to assist in the trial of [violation of federal criminal statutes by persons whose identities are unknown] in the Southern District of Florida and other judicial districts in the United States in which the Government is interested. In that connection you are specially authorized and directed . . . to conduct . . . any kind of legal proceedings . . . including grand jury proceedings . . . which United States attorneys are authorized to conduct.[5]

Appellants contend that Steinberg's commission did not "specifically direct" him to appear before the grand jury pursuant to 28 U.S.C. §515(a). This argument has been rejected in all circuits that have considered it. *See United States* v. *Prueitt,* 540 F.2d 995 (9th Cir. 1976); *Infelice* v. *United States,* 528 F.2d 204 (7th Cir. 1975); *In Re Grand Jury Subpoena of Persico,* 522 F.2d 41 (2nd Cir. 1975); *United States* v. *Wrigley,* 520 F.2d 362 (8th Cir. 1975), *cert. denied,* 423 U.S. 987, 96 S.Ct. 396, 46 L.Ed.2d 304. In *United States* v. *Wrigley,* 520 F.2d 362 (9th Cir. 1975), the Ninth Circuit, rejecting the defendant's argument that a letter of appointment identical to the letter being attacked in this case was too broad and failed to give specific direction in the grant of authority held that the statute does not limit the employment of special attorneys to particular types of cases identified as unusually important or requiring particular expertise; the statute is a grant of authority, not a limitation. *Id.* at 364-68. We concur and hold that the letter of appointment for special attorney Steinberg complied with §515(a).

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[5] R., Vol. III, p. 789.

Finally, appellant Leppo argues that the trial judge should have granted a mistrial when a Government witness commented on his silence at the time of his arrest after he had been given his Miranda warnings. At trial, to lay the foundation for evidence seized from Leppo, agent Jansen, who executed the search warrant, testified:

> I executed a search warrant to his person, and he was advised of his rights according to the Advice of Rights form.[6]

Defense counsel for Sklaroff, Mr. Hogan, objected:

> Your Honor, I object. Whether he was advised of his rights is immaterial. It violates his rights under the Fifth Amendment of the United States in implying that he had a duty to speak. The Government has not provided us with statements of any witnesses and therefore I would object to this line of questioning.[7]

The judge overruled his objection and at that moment the witness, spontaneously replying to defense counsel's remarks, stated, "Mr. Leppo declined to make any statement."[8] Defense counsel immediately objected to the witness' remark and the trial judge sustained their objections, instructing the jury that a defendant has an absolute right not to say anything during his arrest or trial. After he denied counsel's motion for a mistrial, the judge again instructed the jury to disregard the witness' statement. Likewise, in his final instructions to the jury, without making a direct reference to the incident, he stated that a defendant does not have to introduce any evidence or prove his innocence.

[6] The Supreme Court has held in *Doyle* v. *Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), that the due process clause forbids the prosecution from using evidence

[6] R., Vol. VII, p. 408.
[7] R., Vol. VII, p. 409.
[8] *Id.*

of a defendant's post-arrest, post-Miranda warning silence either for substantive or impeachment purposes. In two cases announced since *Doyle,* this court has found an infraction of the *Doyle* rule, but has also held that violation to constitute only harmless error. Thus, noting that the prosecutor did not "focus on" or "highlight" defendant's silence in his cross-examination and closing remarks and that the prosecutor's comments did not strike at the "jugular" of the defendant's story this court held to be harmless error the prosecution's elicitation of the defendant's silence during his arrest. *United States* v. *Davis,* 546 F.2d 583 (5th Cir. 1977). Likewise, in *Chapman* v. *United States,* 547 F.2d 1240 (5th Cir. 1977), a panel of this court held another prosecutorial question on the defendant's post-Miranda warning silence to be harmless error, noting that "when there is but a single reference at trial to the fact of defendant's silence, the reference is neither repeated nor linked with defendant's exculpatory story, and the exculpatory story is transparently frivolous and evidence of guilt is otherwise overwhelming, the reference to defendant's silence constitutes harmless error." *Id.* at p. 1250. That standard was met here, for in this case there was only one reference to the defendant's silence and that reference was neither made nor elicited by the prosecution, but instead resulted from a spontaneous remark made by the witness. The prosecution never again mentioned the witness' comment and the judge adequately instructed the jury to disregard the comment. Further, no circumstance in Leppo's case gave rise to any expectation that Leppo, if innocent, would have made a statement at the time of his arrest, for his silence did not contradict any exculpatory story made in his defense, since indeed no such story was told.[9] In short, the fact of his post-Miranda warning silence was irrelevant to the issues presented at trial.

[9] Leppo's defense regarding the Government's evidence against him went only to its sufficiency; his defense involved no exculpatory story that a post-*Miranda* silence would negate.

We have examined defendant Leppo's other contributions of error[10] and, finding them to be without merit, we affirm both defendants' convictions.

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[10] Leppo's other allegations of error include: the court's failure to sever the Leppo count from the Goldstein count, the court's issuance of an over broad instruction, the Government's withholding of favorable evidence from Leppo, and his conviction upon insufficient evidence.

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

No. 75-2116

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,
v.
MARTIN SKLAROFF, REUBEN GOLDSTEIN, and PEARL LEPPO, a/k/a EARL LEPPO,
DEFENDANTS-APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Before MORGAN, CLARK and TJOFLAT, *Circuit Judges.*

ON PETITION FOR REHEARING
(June 30, 1977)

PER CURIAM:

IT IS ORDERED that the petition for rehearing on behalf of Earl Leppo filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:
(s) (Illegible) MORGAN
United States Circuit Judge

APPENDIX C

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. §2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §1084

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitled the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.
(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.
(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is noti-

fied in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscribed, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

18 U.S.C. §1952

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
  (1) distribute the proceeds of any unlawful activity; or
  (2) commit any crime of violence to further any unlawful activity; or
  (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C. §1955

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—
  (1) "illegal gambling business" means a gambling business which—
    (i) is a violation of the law of a State or political subdivision in which it is conducted;
    (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
    (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.
  (2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

18 U.S.C. §2510. Definitions

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device;

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscribed or used by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (11) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents," when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States Court of Appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

18 U.S.C. §2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection.

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communications common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the

rendition of his service or to the protection of the rights or property of the carrier of such communication: Provided, That said communication common carriers shall not realize service observing or random monitoring except for mechanical or service quality control checks.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the montoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interpretation unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47

U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

§2512. Manufacture, distribution, possession, and advertising of wire or oral communication intercepting devices probihited. —

(1) Except as otherwise specifically provided in this chapter [18 U.S.C.S. §§ 2510-2520], any person who willfully—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications,

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or other employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or

a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications. (June 19, 1968, P.L. 90-351, Title III, § 802, 82 Stat. 214.)

§2513. Confiscation of wire or oral communication intercepting devices.

Any electronic, mechanical, or other device used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States

Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General. (June 19, 1968, P.L. 90-351, Title III, § 802, 82 Stat. 215.)

18 U.S.C. §2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. §2516. Authorization for interception of wire or oral communications

(1) The Attorney General or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code

(relating to the enforcement of the Atomic Energy Act of 1954, or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan) section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

18 U.S.C. §2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to

the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the manner of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

18 U.S.C. §2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications to to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause

to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The Judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interceptions of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and locations of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement to the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the

purposes for which it is granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In

the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon the order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for the use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon

a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State Court

unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with the copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of the authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

18 U.S.C. §2519. Reports concerning intercepted wire or oral communications.

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified or denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where the communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or a principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the man power and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which the arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions, and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to

orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

Supreme Court, U.S.
FILED
DEC 6 1977
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Nos. 77-164 and 77-169

In the Supreme Court of the United States

OCTOBER TERM, 1977

EARL LEPPO, PETITIONER

v.

UNITED STATES OF AMERICA

REUBEN GOLDSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is not yet reported.

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[1]"Pet. App." refers to the Appendix in No. 77-164.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1977. Petitions for rehearing were denied on June 30, 1977. The petitions for a writ of certiorari were filed on July 29, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the applications for orders to conduct electronic surveillance of petitioners sufficiently established that other investigative methods were inadequate or unlikely to succeed.

2. Whether the evidence against petitioner Leppo that derived from the electronic surveillance should have been suppressed because the applications for authority to conduct that surveillance failed to identify him as a person known to be engaged in the commission of the offense under investigation.

3. Whether the trial court erred in quashing petitioner Leppo's *subpoena duces tecum* seeking documents relating to his motion to suppress the testimony derived from the electronic surveillance.

4. Whether the government withheld favorable evidence from petitioner Leppo relating to the identification of his voice on the tapes.

5. Whether a government witness' spontaneous reference to petitioner Leppo's silence upon being given *Miranda* warnings denied him due process.

STATUTE INVOLVED

18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing * * * the interception of a wire * * * communication * * * shall include the following information:

> * * * * *
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including * * * (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be to dangerous;
>
> * * * * *

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner Leppo was convicted on five counts and petitioner Goldstein on four counts of using interstate telephone facilities to carry on unlawful gambling activity, in violation of 18 U.S.C. 1952. Petitioner Leppo was sentenced to five concurrent terms of one year's imprisonment and fined $5,000. Petitioner Goldstein was sentenced to four concurrent terms of three years' imprisonment.[2] The court of appeals affirmed (Pet. App. A).

The evidence established that between June 13 and July 8, 1973, petitioners used interstate telephone facilities to carry on unlawful gambling activity. Petitioner Goldstein, operating from Las Vegas, would telephone Martin Sklaroff, a Miami bookmaker, and give him information

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[2]Co-defendant Martin Sklaroff was sentenced to four years' imprisonment and fined $5,000.

relating to professional baseball, including the "line" (the odds on the outcome of the game). Several minutes later petitioner Leppo, a bookmaker operating in the Boston area, would call Sklaroff, receive the line information, which was usually unchanged from the line Sklaroff received from Goldstein, and then place substantial bets with Sklaroff. During the 15 days of interception, Sklaroff accepted bets from petitioner Leppo and others amounting to more than $500,000.

ARGUMENT

1. Both petitioners contend that the applications for electronic surveillance did not satisfy the requirements of 18 U.S.C. 2518(1)(c) because they did not explain why "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Scrutiny of the affidavits (CA App. 21, 53)[3], however, fully supports the conclusion reached by the courts below that the applications satisfactorily demonstrated that ordinary investigative methods were not adequate to discover the full scope of the gambling operation and produce evidence necessary for a successful prosecution.

The affidavits accompanying the government's applications for intercept orders informed the court that the FBI agent in charge of this case had conducted several months of investigation into Sklaroff's illegal gambling activities and that, through the use of eight informants, the government had gathered information indicating that Sklaroff was using several telephone lines in Miami to

[3]"CA App." refers to Volume I of the appendix in the court of appeals, a copy of which we are lodging with the Clerk of this Court. "R." preceded by a volume number indicates the separately paginated record on appeal. "Tr." indicates the trial transcript.

conduct a bookmaking business (CA App. 21, 23, 28-30, 33-35, 39-40). By examining telephone company records the FBI Agent had determined the subscribers of these numbers (*id.* at 25). Surveillance of Goldstein and Sklaroff, among others, had also been employed, and it was known that each had been previously convicted of gambling-related offenses (*id.* at 23, 24, 28, 31-33, 35-39). The affidavits further stated that this evidence was insufficient for a prosecution of the suspects for unlawful gambling activity, since the FBI did not know the content of the telephone calls between Goldstein and Sklaroff, and all of the government's informants were unwilling to testify due to fear for their personal safety (*id.* at 23, 40, 42, 71-73). The affidavits also informed the court that it was the agent's experience that search warrants were inadequate because gambling records were often kept on either "flash" or water soluble paper, and even if not destroyed they were often sketchy and rarely established provable connections between all the participants in the illegal enterprise (*id.* at 40-41, 71-73).

The requirements of 18 U.S.C. 2518(1)(c) are satisfied when the application and supporting affidavit, viewed in a practical and commonsense fashion (S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), provide a sufficient factual basis for the issuing judge to conclude that conventional investigative techniques will be inadequate to expose the full scope of the criminal activity under investigation or the identity of the participants therein. See, *e.g.*, *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Scibelli*, 549 F. 2d 222, 226 (C.A. 1), certiorari denied June 7, 1977 (No. 76-1212); *United States* v. *Hinton*, 543 F. 2d 1002, 1011 (C.A. 2); *United States* v. *Armocida*, 515 F. 2d 26, 38 (C.A. 8), certiorari denied, 423 U.S. 858; *United States* v. *Robertson*, 504 F. 2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United*

States v. *Brick*, 502 F. 2d 219, 224 (C.A. 8). Moreover, "[M]erely because a normal investigative technique is theoretically possible, it does not follow that it is likely" (S. Rep. No. 1097, *supra*, at 101). Congress did not intend "to preclude resort to electronic surveillance until after all other possible means of investigation have been exhausted by investigative agents." *United States* v. *Hinton*, *supra*, 543 F. 2d at 1011. Here, the affidavits indicate that alternate investigative procedures were either attempted and found to be ineffective or not tried because it was the opinion of the agent, based upon his experience and the particular facts of this case,[4] that no benefit would be derived therefrom. They therefore satisfied the requirements of 18 U.S.C. 2518(1)(c). *United States* v. *Pachecho*, 489 F. 2d 554, 555 (C.A. 5), certiorari denied, 421 U.S. 554; *United States* v. *Smith*, 519 F. 2d 516, 518 (C.A. 9); *United States* v. *Kirk*, 534 F. 2d 1262, 1274 (C.A. 8), certiorari denied June 27, 1977 (No. 75-7001).

Petitioners argue, however, that the decision in this case is in conflict with the Ninth Circuit's decision in *United States* v. *Kalustian*, 529 F. 2d 585. We acknowledge that the *Kalustian* panel appears to have interpreted 2518 (1)(c) to require greater specificity in the supporting affidavits than has been required by other courts. But that opinion has not been followed in any other circuit[5] and does not even represent the consistent view of the Ninth

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[4]These included the facts that the subjects of the investigation were experienced gamblers, who had previously been convicted of federal gambling offenses, and that the informants with whom they dealt had spent most of their adult lives as gamblers or bookmakers.

[5]See, *e.g.*, *United States* v. *Scibelli*, *supra*; *United States* v. *Hinton*, *supra*; *United States* v. *Kirk*, *supra*.

Circuit.[6] Indeed, in *United States* v. *Spagnuolo*, 549 F. 2d 705 (C.A. 9), the court recognized that its circuit's decisions in this area "often lead to results difficult to harmonize" and tried "to promulgate a manageable standard by which to judge affidavits under 2518(1)(c)." 549 F. 2d at 709-710. The standard it adopted is that "the affidavit, read in its entirety, must give a factual basis sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand * * *. An affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with 2518(1)(c). *Kalustian* teaches no more than that." 549 F. 2d at 710. The Ninth Circuit standard as promulgated in *Spagnuolo* was clearly met here. Accordingly, even assuming that some conflict remains between the standard used in the Ninth Circuit and elsewhere[7], this case does not directly present that issue.

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[6]For example, in *United States* v. *Pezzino*, 535 F. 2d 483 (C.A. 9), the Ninth Circuit held that an affidavit not unlike the one here involved was sufficient. See also *United States* v. *Scully*, 546 F. 2d 255 (C.A. 9), certiorari denied, 430 U.S. 970; *United States* v. *Turner*, 528 F. 2d 143 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996.

[7]Since no other court of appeals has followed *Kalustian*, and since the Department of Justice has since *Kalustian* made efforts to conform its applications to the stringent standards of that case (the present applications were submitted two years before the *Kalustian* decision), we have not believed it justified to ask this Court to review those cases that we have lost in the Ninth Circuit on the basis of this issue. Moreover, this Court has, since the time of the *Kalustian* decision, declined numerous requests to review decisions from the Ninth Circuit and other circuits alleged to be in conflict with *Kalustian* (see, *e.g.*, cases cited *supra*, notes 5 and 6), and nothing has happened recently to justify any change in this Court's refusal to review what is, at heart, an intra-circuit conflict of little continuing importance. Cf. *Wisniewski* v. *United States*, 353 U.S. 901.

2. Petitioner Leppo contends that the omission of his name in the application for electronic surveillance violated 18 U.S.C. 2518 (1)(b)(iv), which provides that an intercept application should contain, *inter alia*, "the identity of the person, if known, committing the offense and whose communications are to be intercepted." He urges that this alleged omission required suppression of the intercepted telephone calls as to him, since the omission is *per se* indicative of governmental bad faith.

The facts as presented to the district court in a pre-trial hearing indicate that, although the government knew that petitioner Leppo was committing gambling offenses, it had no reason to believe that petitioner was communicating with Sklaroff over the target telephone lines. It was discovered only after the interceptions that petitioner contacted Sklaroff from pay telephones, charging the calls to Michele Fortune and reimbursing her later (Tr. 142, 145, 147-149). Although Fortune was also under investigation, there was no evidence at the time to connect her with petitioner (Tr. 23-25). The district court therefore properly denied petitioner's motion to suppress, ruling that the government did not have probable cause to believe Leppo would be overheard on the telephones being monitored (Tr. 50).

In any event, even assuming *arguendo* (as did the court of appeals, Pet. App. 12), that petitioner Leppo should have been identified in the applications, this Court's decision last term in *United States* v. *Donovan*, 429 U.S. 413, holds that the omission does not justify suppression of his intercepted conversations. The Court in *Donovan* found it unnecessary to consider whether suppression might be appropriate if "Government agents knowingly failed to identify [known participants] for the purpose of keeping relevant information from the District Court that

might have prompted the court to conclude that probable cause was lacking" (429 U.S. at 436, n. 23). Although petitioner Leppo argues that this case presents that issue (Pet. No. 77-164, pp. 6-7), the record does not support any such assertion. Indeed, petitioner himself claims only that the omission was deliberately made "[f]or the sole purpose of expediting [the] investigation" (*id.* at 7), not that the identification of Leppo would have been in any way relevant to the district court's determination of probable cause.

3. Petitioner Leppo further contends (Pet. No. 77-164, p. 7) that the district court erred in quashing his *subpoena duces tecum* for production of FBI investigatory documents related to his motion to suppress evidence obtained through the interception. The documents sought by petitioner consisted of two telegrams and one letter sent to the Boston FBI office by the Miami FBI office between June 15 and July 12, 1973. The first communication instructed the FBI to discontinue surveillance of petitioner because the first intercept had been terminated. The other documents requested identification of a voice, thought to be petitioner's, intercepted in a June 13th conversation. Petitioner originally requested these documents in a discovery motion. After failing to obtain them by that means, he subpoenaed the agent in charge of the investigation.

The district court quashed the subpoena on the ground that petitioner was improperly attempting to use Rule 17, Fed. R. Crim. P., to circumvent the limitations imposed by Rule 16 on discovery of materials in the possession of the government. See *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 220; *United States* v. *Nixon*, 418 U.S. 683, 698-700; *United States* v. *Marcello*, 423 F. 2d 993, 1006 (C.A. 5), certiorari denied, 398 U.S. 959. Whatever the merits of

that ruling, petitioner received copies of the documents at trial (Tr. 858-861, 879-880)[8] and used them to support his suppression claim at a post-trial hearing, where they were considered by the district court in ruling on petitioner's motion (Tr. 904). Thus, even if the subpoena should not have been quashed, petitioner was not harmed, since he received and used the material he sought.

4. Petitioner Leppo argues (Pet. No. 77-164, p. 7) that the district court erred in denying his pre-trial motion for identification of two persons who had listened to the tapes and had been unable to identify petitioner's voice. The district court held that the government would be required to identify only any persons who had told the FBI that the voice on the tapes was not petitioner Leppo's—not persons who were simply unable to express any opinion concerning the identity of the speaker.

Petitioner Leppo's motion for identification itself reveals that he had already been told the identity of one of the individuals, Sidney Covich (III R. 670). At trial, the identification of Covich was confirmed, and the other person who could not recognize petitioner Leppo's voice was identified as FBI Agent John Jansen (Tr. 360). Petitioner Leppo brought the inability of both Covich and Jansen to identify Leppo's voice to the attention of the jury through cross examination (Tr. 451, 753)[9] and argued to the jury that this inability cast doubt

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[8]The documents were apparently made available to the trial judge, who, after *in camera* inspection, provided petitioner with the relevant items.

[9]Although the court indicated that it would permit Covich to testify directly to his inability to identify Leppo's voice (Tr. 369), counsel elected to bring this out by cross-examining an FBI agent (Tr. 753). Agent Jansen was himself cross-examined about his failure to identify the voice (Tr. 451).

on the other identification evidence (Tr. 996). Accordingly, even if petitioner Leppo was entitled to the disclosure of persons who could not identify his voice on the tapes (but cf. *Brady* v. *Maryland*, 373 U.S. 83; *Moore* v. *Illinois*, 408 U.S. 786, 794), he received and used that information. Petitioner does not suggest that he was in any way injured by the timing of the disclosure and nothing in the record suggests such injury. There is, in any event, no obligation to disclose even exculpatory information in advance of trial, *United States* v. *Agurs*, 427 U.S. 97, 108.

5. Finally, petitioner Leppo contends (Pet. No. 77-164, pp. 7-8) that a witness' passing reference to Leppo's silence upon being given *Miranda* warnings violated his Fifth Amendment rights.

While the prosecution was laying the foundation for the introduction of evidence seized from Leppo, a government agent testified that: "I executed a search warrant to his person, and he was advised of his rights according to the Advice of Rights Form" (Tr. 408). Defense counsel for codefedant Sklaroff objected, stating "The Government has not provided us with any statements of any witnesses and therefore I would object to this line of questioning" (Tr. 409). The court overruled the objection and the witness, apparently speaking to defense counsel, stated spontaneously that petitioner "declined to make any statement." *Ibid.* The court immediately instructed the jury that petitioner had no duty to come forward with any evidence or make any statement and that they should disregard the agent's response (Tr. 409-410), and it repeated this instruction, without specific reference to the incident, in its final charge (Tr. 1058).

It is clear that the prosecution did not plan to reveal petitioner's silence, much less to ask the jury to draw any conclusion from it. Cf. *Doyle* v. *Ohio*, 426 U.S. 610.

Instead, the witness' spontaneous response to a defense objection was simply an effort by the witness to explain to counsel what had transpired. Accordingly, this testimony did not violate petitioner Leppo's Fifth Amendment rights. *United States* v. *Haro-Portillo*, 531 F. 2d 962, 963-964 (C.A. 9). Moreover, considering the weight of the evidence against petitioner, the irrelevance of his silence when he was searched to any issue in dispute at trial, and the court's strong curative instructions, any possible error was harmless beyond a reasonable doubt. See *Egger* v. *United States*, 509 F. 2d 745, 747 (C.A. 7), certiorari denied, 423 U.S. 842.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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